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## Book Notes

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# BOOK NOTES

## THE LAW OF THE LAND

By Charles Rembar

Simon And Schuster, New York, 1980. 447 pages.  
ISBN 0-671-24322-5

American legal education, to be complete, must encompass legal history. Charles Rembar's *The Law of the Land: The Evolution of Our Legal System* is a compendium of legal history which should be useful to lawyers and laymen alike. The author is a lawyer, amateur historian, and storyteller. His story is admittedly long—from the Anglo-Saxon days of trial by ordeal to the present times of the Burger Court; it teaches us that law is an outgrowth of the interaction among men, molded not only by the forces of nature but also by human passion.

Rembar's history is not static. The author approaches his study with a view to understanding and making necessary changes in our present legal system. He insists that the staying power of our legal system lies in its ability to evolve with the changing times. In his discussion of the rights of the accused, Rembar points out that when the American Bill of Rights was ratified in 1789, "due process" did not incorporate the right to counsel. He states, "Today it does because the world has changed. These decisions do not tamper with the meaning of the Bill of Rights. A failure to arrive at these decisions would" (p. 406).

A chief stylistic strength of *Law of the Land* may also be the source of an analytical weakness. Rembar's book is an anecdotal history, and as such is enriched by human drama. Though storytelling is apt to keep the reader's interest, it does not provide a complete picture. For example, Rembar attributes the growth of trial by jury largely to the influence of Henry II of England, whose character he describes as "a combination of terrifying power and humaneness alien to the age" (p. 131). Although Rembar concedes that the practice of trial by jury is derived from many sources, he fails to enumerate what these sources are. He does, however, furnish us with a concise biography of good King Henry. Thus, the reader is left with the false impression that trial by jury, perhaps the most distinguishing feature of Anglo-American law, may have resulted because a king dared to be different.

This is not to say that the author misses the point. In fact, Rembar's discussion of the development of the jury system is quite original and thought-provoking. For example, he reaches the unsettling but not totally unfounded conclusion that juries may be unnecessary.

Much of Rembar's work is devoted to a discussion of the litigation process. One of the basic elements of the litigation process is the plead-

ing stage. In Anglo-Saxon times the whole of one's case turned upon the adequacy of the writ. The progression to code pleading was an improvement, but as Rembar stresses, "Code pleading, in its various stages, has always been a rather ugly structure" (p. 248). When code pleading became too cumbersome, it was time to adopt new rules, or as the author calls them, "The New Old Rules" (Chapter 11). The progression to the present system of notice pleading under the Federal Rules of Civil Procedure was the next logical step. "Thus pleading, which occupied so prominent a place for more than half a millennium, becomes a minor element in litigation. The law forsakes a great pernicious art" (p. 251).

Rembar delves into the annals of Anglo-Saxon legal history, to explain the meaning of highly technical common law pleadings with clarity and wit: "Traverse meant 'not so—you lie.' Demurrer meant 'so what.' Confession and avoidance meant 'yes, but . . .'" (p. 226). He does not inquire into the evolution of our republican form of government or the administration of our legal system. Rather, he examines the law as it is derived from the courts. Rembar points out that the common law is often considered to be the creation of judges; not so, he reveals:

"Judge made" is a phrase the realists use. In fact it is more often lawyer-made. Though the common law gains the force of law only through the rulings of the courts, a new idea originates usually in an advocate's head. This is not because the air is thinner at that elevation; there is not the rich atmosphere of the need to win. The lawyer-as-champion faced with adverse precedent is apt to respond with more imagination than the lawyer-as-arbiter sitting neutrally in judgment. Not that judges contribute no creative thought, they contribute much; but not as much (p. 56).

Statutes, on the other hand, are derived from legislatures and presented as declarations of existing law. As Rembar indicates, "A statute is law established by vote of an assembly in response to political demand, and then formally inscribed" (p. 59). Statutes are not self-enforcing; their enforcement often depends upon going to court and having the court, after interpreting the legislation, issue an order or a judgment.

Rembar makes effective use of research to enhance his story and present a secondary theme for the thoughtful reader. Instead of merely directing the reader to other authorities for greater detail, he uses footnotes to focus on the present state of affairs and demonstrates the relevance of history to contemporary matters.

*The Law of the Land* does more than simply illustrate the Anglo-Saxon antecedents of our present legal system. As Rembar suggests, "the law ought to be a bit beyond the reach of ordinary understanding . . . [and] good law lies somewhere between the obvious and the recondite." In so saying, Rembar challenges the reader to contemplate the

direction of our legal system. According to Rembar, it is vital to recognize the continuing evolution of the law, for "[n]othing is timeless in our law except the idea of law itself."

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## HOUSING: FEDERAL POLICIES AND PROGRAMS

BY JOHN C. WEICHER

American Enterprise Institute for Public Policy Research, Washington, D.C.,  
1980. 161 pages. ISBN 0-8447-3378-4

In 1973 President Nixon suspended all housing programs and appointed a task force to study existing programs and make recommendations. These actions reflected contemporary sentiment that federal housing schemes were ineffective. Today, a myriad of new housing plans have been enacted, and many suspended programs have been revived.

John C. Weicher's *Housing: Federal Policies and Programs* is a concise, readable survey of major government housing efforts. The author, Director of the Housing Markets Program at the Urban Institute, skillfully traces the development of federal housing policies and programs since the 1930's and assesses current federal activity "in the context of housing market conditions which result primarily from the private decisions of individuals and firms" (p. 3). Weicher concentrates on the degree of success that the federal government has attained in providing decent housing for the poor and increasing the opportunities for homeownership by American families.

Congress established the goal of "a decent home and suitable living environment for every American family" in the Housing Act of 1949.<sup>1</sup> According to Weicher, the substantial progress made toward achieving this goal has resulted from the combined effects of federal programs, rising incomes, and a relative decline in the price of housing. Progress has been hampered, however, by bureaucratic inability to replace obsolete measures of housing inadequacy, such as a lack of indoor plumbing. The author vigorously criticizes the expense/income ratio as a workable substitute. This ratio, currently used to determine subsidy amount in several programs, compares the cost of housing to the income of residents. It does not measure the quality of housing and can be readily altered by rising incomes and housing market fluctuations. Nevertheless, these objections appear short-sighted. Decent housing is of little consequence to those who cannot afford it. Policymakers must determine when the ratio necessary to achieve decent housing becomes unacceptable.

Weicher emphasizes the success achieved by direct subsidy programs for tenants in existing housing. These programs enable poor families to enjoy decent living conditions at a relatively low cost to the public and avoid the neighborhood hostility often faced by residents of large housing projects. Section 8 of the Housing and Community Development Act of 1974 employs new construction, existing housing, and

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1. 42 U.S.C. § 1441a (1976).

substantial rehabilitation programs to help communities provide low-income housing in private accommodations.<sup>2</sup> The Section 8 subsidy program for existing housing functions with a minimum of regulation. It places unusual responsibility on recipient-tenants who select housing which meets specific rent and quality standards.

The author is especially adept at identifying well-intentioned government regulations that unnecessarily increase housing costs. For example, eligible Section 8 developers are required to charge "fair market rents" comparable to rents charged at unsubsidized, recently constructed, and modestly designed apartment complexes (p. 71). Developers are permitted, however, to charge higher rents for units falling within one of several categories, which include housing for the elderly and projects in which every tenant is subsidized.

Housing and Urban Development rules that promote careless construction and serve to defeat economic integration of subsidized and unsubsidized tenants demand reform. One rule cited by Weicher requires project developers to estimate the maximum percentage of subsidized units anticipated for each project (pp. 49, 68). The author claims that prudent developers report one-hundred percent subsidy because the figure cannot be raised should expectations change. As a result, developers of projects who rent exclusively to subsidized tenants do not risk producing and maintaining high-quality units that rent on the open market.

The author's analysis of federal efforts to increase the opportunities for homeownership mirrors his treatment of federal housing programs—he reviews the current situation before weighing individual policies. Weicher challenges the media perception that homeownership constitutes a "fading dream," reporting that more Americans own their homes than ever before. According to the author, selling one's present home to acquire a new one cushions the impact of inflation and skyrocketing interest rates. Staggered release of government figures causes the media to overlook the concurrent effect of rising incomes on home buying. Former renters and families buying homes for the first time are purchasing existing homes and "trading up" at a later date. The author's failure to define "expenditures," however, weakens his claim that most first-time buyers are able to hold housing expenditures within twenty-five percent of their incomes. The statistic apparently ignores the homeowner's everyday costs. Homeownership may not be a "fading dream," but it presents a difficult challenge to first-time purchasers now and in the future.

The size and format of *Housing: Federal Policies and Programs* provide easy reference but limit extensive consideration of possible legislative reform. Ad hoc treatment of individual programs, however,

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2. 42 U.S.C. §§ 1437-1437j (1976 & Supp. II 1978), as amended by Pub.L.No. 96-153, 93 Stat. 1106 (1979).

may cloud the reader's understanding of overall government direction. Unfortunately, the book fails to address a problem shared by many government programs—they serve only a fraction of those in need.<sup>3</sup>

Although the reader may long for less polish and more compassion, the author's arguments are thought-provoking. Weicher effectively illustrates suspect federal justification for several housing programs. *Housing: Federal Policies and Programs* will enhance the reader's knowledge in a critical area.

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3. See, e.g., McCarron, *Rent Subsidy Plan: A Lottery Only A Few Win*, Chicago Tribune, Nov. 16, 1980, at 1, col. 2.

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